U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

INDEX

File: A73 015 585 - Chicago

Date: AUG 20 1997

In re: ERLYN GUMAPAS, Beneficiary of visa petition filed by
EMMANUEL VERA GUMAPAS, Petitioner

IN VISA PETITION PROCEEDINGS

APPEAL

ON BEHALF OF PETITIONER: Stephen D. Berman, Esquire
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ON BEHALF OF SERVICE: Seth B. Fitter
Assistant District Counsel

APPLICATION: Petition to classify status of alien relative for issuance of immigrant visa

I. BACKGROUND

The United States citizen petitioner has applied for immediate relative status for the beneficiary as his spouse under section 201(b) of the Immigration and Nationality Act, 8 U.S.C. § 1151(b). In a decision dated July 18, 1995, the district director denied the visa petition because the petitioner and beneficiary conspired to enter into a fraudulent marriage. The petitioner has appealed. The request for oral argument is denied. 8 C.F.R. § 3.1(e). The appeal will be sustained.

II. FACTUAL AND PROCEDURAL HISTORY

A. The petitioner is a 42-year-old native of the Philippines. He arrived in the United States in November 1982, and unlawfully remained here until his November 1989 marriage to a United States citizen. Five days after the marriage, the petitioner's wife filed a visa petition on his behalf and an application to adjust his status. These were approved and the petitioner became a conditional permanent resident in January 1990.

B. The beneficiary is a 42-year-old native and citizen of the Philippines. On June 9, 1990, she wedded the still-married petitioner in the Philippines. The couple's marriage contract indicates that both parties were single at the time.

C. In October 1993, the petitioner became a naturalized citizen.

D. On December 8, 1993, the beneficiary filed an application for a nonimmigrant visa to the United States. She used her birth name on the application and indicated that she was single. On December 29, 1993, the beneficiary was stopped at O'Hare International Airport in Chicago and questioned by an officer of the Immigration and Naturalization Service. During her interview with the officer, the beneficiary admitted that she knew that the petitioner was married when she married him in 1990. She stated that she and her husband discussed her staying in the United States indefinitely, but knew that was not currently possible. The beneficiary also stated that her husband planned on divorcing his United States citizen wife. Finally, the beneficiary stated that she applied as a single woman because she believed she would be unable to obtain a nonimmigrant visa as a married woman.

E. The petitioner was also interviewed at the airport that day. During this interview, the petitioner admitted that he married his United States citizen wife solely to obtain citizenship, and that the beneficiary knew of his motivation. He further stated that his plan included the eventual filing of a visa petition on behalf of the beneficiary. Finally, the petitioner noted that he has "known [the beneficiary] since 1975 and she has been my long love."

F. The record is not clear on what action may have been taken against the beneficiary following the airport interviews, but it appears she was paroled into the United States.

G. On January 10, 1994, the beneficiary had her 1990 marriage annulled. We note that in court documents, the beneficiary claimed not to know of her husband's marriage to the United States citizen at the time of her wedding.

H. On February 7, 1994, the petitioner divorced his United States citizen wife.

I. On September 10, 1994, the petitioner married the beneficiary in Chicago. He filed the current petition in November 1994.

J. On July 18, 1995, the district director denied the petition, citing sections 204(c)(1) and (2) of the Act, 8 U.S.C. §§ 1154(c)(1) and (2).[1] He stated that the couple conspired with each other to enter into a marriage for the purpose of evading the immigration laws. He supported this argument with the beneficiary's statement that she knowingly entered into a bigamous marriage, and that she concealed the marriage when applying for her nonimmigrant visa. The

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[1] The record does not contain a notice of intent to deny, nor is there any indication that the petitioner was contacted by the Service prior to the denial other than to inform him that his case was being transferred to another office.

district director also pointed out the beneficiary's contradictory statements on her petition to annul the marriage concerning her knowledge of the petitioner's marital status.

K. On appeal, the petitioner argued that the district director incorrectly applies section 204(c), 8 U.S.C. § 1154(c) to the couple.

III. APPLICABLE LAW

Section 204(c) of the Act states, in pertinent part,

> Notwithstanding the provisions of subsection (b) no petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

This section was amended by section 4(a) of the Immigration Marriage Fraud Amendments of 1986 ("IMFA"), Pub. L. No. 99-639, 100 Stat. 3537, 3543 (1986). Among other modifications, IMFA added section 204(c)(2). 100 Stat. at 3543. We found that this clause extended the operation of section 204(c) to cases where an alien had entered, or attempted or conspired to enter, into a sham marriage for the purpose of obtaining an immigration benefit, but no benefit was actually sought. Matter of Isber, 20 I&N Dec 676, 678 (BIA 1993); 8 C.F.R. § 204.2(a)(ii).[2]

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[2] We note that this amendment appears to overrule our decision in Matter of Concepcion, 16 I&N Dec. 10 (BIA 1976), and the portion of Matter of Anselmo, 16 I&N Dec. 152 (BIA 1977) that follows Concepcion. In that case, we held that an actual marriage, rather than one that only existed on paper, must have occurred for section 204(c), as it then read, to operate. It now appears that such a paper marriage would fall under the "attempted . . . to enter into a marriage" language of the statute. Additionally, our decision in Matter of Oseguera, 17 I&N Dec. 386 (BIA 1980), appears to be overruled by the amendment. In that case, we held that 204(c) does not operate where an alien entered the United States on an immigrant visa unrelated to his or her marital status even if the alien entered into a sham marriage before traveling to this country. As discussed above, a benefit need not actually be sought for the section to operate. See also Matter of Kahy, 19 I&N Dec. 803, 804 n.1 (BIA 1988).

A finding by the district director that section 204(c) applies to an alien must be based on evidence that is substantial and probative. Matter of Agdinaoay, 16 I&N Dec. 545 (BIA 1978); Matter of La Grotta, 14 I&N Dec. 110 (BIA 1972). In making that adjudication, the district director may rely on any relevant evidence, including evidence having its origin in prior Service proceedings involving the beneficiary. This determination, however, is for the district director to make, and he should not ordinarily give conclusive effect to the determinations made in prior collateral proceedings. The district director should reach his own independent conclusion based on the evidence actually before him. Matter of Tawfik, 20 I&N Dec. 166 (BIA 1990); Matter of Rahmati, 16 I&N Dec. 538 (BIA 1978); see also Matter of F-, 9 I&N Dec. 684 (BIA 1962). The Service must inform a petitioner of derogatory information to be used against him or her and must give the petitioner a reasonable time to rebut that information. Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988).

Regarding the annulment of the couple's Philippine marriage, we have found that Illinois court's recognize an annulment as voiding a marriage ab initio. Matter of Castillo-Pineda, 15 I&N Dec. 274 (BIA 1975). We do not, however, absolutely recognize that particular effect of an annulment for immigration purposes if a gross miscarriage of justice would occur. Matter of Magana, 17 I&N Dec. 111 (BIA 1979); Matter of Astorga, 17 I&N Dec. 1, 5 (BIA 1979); Matter of Wong, 16 I&N Dec. 87 (BIA 1977); Matter of Castillo-Sedano, 15 I&N Dec. 445 (BIA 1975).

IV. ANALYSIS AND CONCLUSIONS

By his own admission, the petitioner engaged in an elaborate and fraudulent scheme to bring the beneficiary to the United States. It stretched from 1975, when he met his "long time love," until 1994 when he was able to file a petition for her to become a resident. Despite his fraudulent conduct, he has become a citizen of this county, and in the absence of a revocation of his naturalization pursuant to section 340 of the Act, 8 U.S.C. § 1451, he will remain one. Section 204(c) of the Act does not apply to the petitioner himself; it only contemplates the beneficiary's conduct. Consequently, to the extent that the district director's decision was based upon the petitioner's marriage to the United States citizen, we find there is no basis in law for attacking that marriage.

We find that the district director did not base his decision on "substantial and probative" evidence that the beneficiary conspired to enter into a sham marriage. Her Philippine marriage, though entered into bigamously, does not carry the indicia of a fraudulent union for immigration purposes. When she applied for a nonimmigrant visa, she did not rely on the marriage, and in fact concealed it. By her own admission, she recognized that a marriage would be harmful to her immigration concerns. Although she knew that the petitioner was engaged in marriage fraud, there is not enough evidence that she conspired with him regarding her own marriage. It is not

clear why the beneficiary married the petitioner in the Philippines, but it is not apparent that this marriage was "entered into for the purpose of evading the immigration laws." Consequently, we find that there is no miscarriage of justice by following Illinois' recognition of the Philippine marriage as void ab initio. Therefore, we find that section 204(c) does not operate against the beneficiary and thus there is no basis for the denial of the visa petition.

Even if we did not follow Illinois law, we would not find there was sufficient evidence that the Philippine marriage was fraudulent. The district director based his decision of the existence of a bigamous marriage and statements made at the airport. Especially given that the district director did not give the petitioner an opportunity to rebut the derogatory information being used against him, we cannot conclude, based on the record, that there is a basis for the district director's actions.

We are not unmindful that our decision in this case likely further's the petitioner's decades-long plan. But, in our view, the remedy for his deception does not lie in denial of this petition. The focus of this proceeding is on the relationship itself. Matter of McKee, 17 I&N Dec. 332 (BIA 1980). There is no evidence that the Chicago marriage was entered into fraudulently. Consequently, the appeal will be sustained.

ORDER: The appeal is sustained and the visa petition is approved.

FOR THE BOARD